

SEP 01 1995

IN THE UNITED STATES BANKRUPTCY COURT J. BARON GROSHON
FOR THE WESTERN DISTRICT OF NORTH CAROLINA BY: BJS
Deputy Clerk

In Re:)	Case No. 94-10407
)	Chapter 7
GARY ROSS MADILL, and)	
GLORIA JEAN MADILL)	
)	JUDGEMENT ENTERED ON SEP 01 1995
Debtors.)	
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STEVEN L. KLIFF, and)	Adversary Proceeding
MARIANNE D. KLIFF,)	No. 95-1024
)	
Plaintiffs,)	
)	
v.)	
)	
GARY ROSS MADILL,)	
)	
Defendant.)	
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**ORDER DENYING PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS AND DENYING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This cause coming on to be heard and being heard by the undersigned United States Bankruptcy Judge on the Plaintiff's *Motion for Judgment on the Pleadings*, and the *Response and Motion for Summary Judgment* filed by the Defendant. The court has determined that both motions should be DENIED. The court makes the following findings of fact and conclusions of law and enters its Order:

1. Stephen and Marianne Kliff brought suit against the debtor in the Superior Court of the State of California alleging that the defendant intentionally and fraudulently failed to disclose that the house that the defendant constructed and that the plaintiffs purchased from a third-party was defective and that such nondisclosure was fraudulent and willful.

2. The defendant filed an Answer to the Kliff's complaint, but failed to appear at the trial.

3. After a two and one-half week trial, on August 24, 1994, Superior Court of the State of California filed its Judgment on Special Verdict. The jury found no liability as to the third-party. The court directed the jury's verdict against the debtor (who had filed Answer but had failed to defend the action). Specifically relevant to this proceeding, the California judgment provides in response to jury questions 1, 9, and 25:

Question No. 1:

Is defendant Madill liable to plaintiffs for intentional concealment of material facts? (Answer 'yes' or 'no,' then please go to Question No. 2).

Answer:

YES.

Question No. 9:

Is defendant Madill liable to plaintiffs for acting with willful disregard for the rights of plaintiffs? (Answer 'yes' or 'no,' then please go to Question No. 10).

Answer:

YES.

Question No. 25:

Is defendant Madill liable to plaintiffs for breach of warranty? (Answer 'yes' or 'no,' then please go to Question No. 26).

Answer:

YES.

4. As detailed in the Judgment, the jury found that the Kliffs had suffered damages in the amount of five hundred thousand dollars (\$500,000.00).

5. On September 6, 1994, the defendant filed a petition with this Court under Chapter 7 of the Bankruptcy Code.

6. On February 6, 1995, the Kliffs filed a *Complaint to Determine Dischargeability of Debt* in this court.

7. In their complaint the Kliffs argue that the defendant should be collaterally estopped from relitigating the issues of fraud under § 523(a)(2)(A) and willful and malicious injury under § 523(a)(6), because the identical issues were actually litigated and determined in a final and valid prior judgment and the determination of the issues was essential to that judgment.

8. The test for applying collateral estoppel in dischargeability proceedings was set out by the Fourth Circuit in Combs v. Richardson, 838 F.2d. 112, 113 (4th Cir. 1988). The court stated that collateral estoppel will apply if:

(1) the issue sought to be precluded [is] the same as that involved in the prior action, (2) that issue was actually litigated, (3) it was determined by a valid and final judgment, and (4) the determination was essential to the prior judgment.

9. Section 523(a)(2)(A) governing exceptions to discharge provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328 (b) of this title does not discharge an individual debtor from any debt. . .
(2) for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by. . .

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

11 U.S.C. § 523(a)(2)(A).

10. Section 523(a)(6) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge and individual debtor from any debt. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. §523(a)(6).

11. The court finds the responses to the three jury questions relied upon by the plaintiff to be an insufficient basis for collateral estoppel on § 523 grounds. While the California causes of action are similar to the nondischargeability standards of § 523, the jury responses are not specific enough to enable the court to find that the issues litigated in the California proceeding were identical to the issues in this proceeding.

The jury's responses amount to proof of the facts stated and no further proof of those facts will be required. But, those facts established by the jury's verdict forum are not sufficient to require entry of judgment for the plaintiffs pursuant to Section 523.

12. As to the defendant's motion for summary judgment, the defendant has failed to show that there is no genuine issue as to any material fact herein. The record reflects several material factual issues which are in dispute, including without limitation, the issue of the plaintiff's reliance on representations made by the defendant.

13. The defendant not being entitled to a judgment as a matter of law, entry of summary judgment is inappropriate pursuant to F.R.Civ.P. Rule 56(c) and F.R.B.P. Rule 7056.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff's Motion for Judgment on the Pleadings is DENIED and the Defendant's Motion for Summary Judgment is DENIED.

This the 31st day of August, 1995.



George R. Hodges
United States Bankruptcy Judge